

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

ITV DIRECT, INC.,

Plaintiff,

V.

HEALTHY SOLUTIONS, LLC, et al.,

Defendants.

RELATED CASES

CIVIL ACTION NO. 04-CV-10421-JLT

**PLAINTIFF ITV DIRECT'S AND INTERVENOR-DEFENDANT
DIRECT FULFILLMENT, LLC'S REPLY TO CAPPSEALS'
OPPOSITION TO THEIR MOTION TO CONTINUE TRIAL**

Plaintiff and intervenor-defendant ITV Direct, Inc. and intervenor-defendant Direct Fulfillment, LLC (collectively, “ITV” or “plaintiffs”) reply to the opposition filed by Plaintiff-in-Intervention, Cappseals, Inc. (“Cappseals”) to ITV’s motion to continue the trial presently scheduled for May 31, 2005.

A. The Boston Housing Court Trial Was Scheduled Before The Pretrial Conference In This Case.

Undersigned counsel's jury trial in the Boston Housing Court in the case of Harwood Capital Corp. v. Carey was scheduled by Judge Winik on March 16, 2005. It was not until the pretrial conference in that case, which was held on May 11, 2005, that undersigned counsel was notified by the Housing Court that the trial date was a date certain and that there would be no further continuances. Thus, when undersigned counsel appeared at the Pretrial Conference before this Court on April 4, 2005, he was not aware that the Housing Court trial date was a date certain and assumed, as with many state court trial dates, that the case would not necessarily proceed on that date. The undersigned counsel brought this conflict to the Court's attention as

soon as it became clear that the Housing Court would not grant a continuance of undersigned counsel's jury trial. See Supplemental Affidavit of Peter S. Brooks, ¶¶ 2-4, filed herewith.

B. There Is A Need For Clarification Of What Issues Are To Be Tried

Cappseals still persists in seeking to call the undersigned counsel as a witness in this case, although it admits in its opposition that undersigned counsel's testimony is not relevant to its claims in the "first phase" of the trial. Cappseals also asserts that ITV's defenses based upon fraud, misrepresentation and breaches of the distribution agreement it entered into with defendant Healthy Solutions, LLC ("Healthy Solutions") cannot serve as a set-off against amounts Cappseals claims it is due under its contract with Healthy Solutions. Thus, there should be no need for Cappseals to call the undersigned counsel as a witness in this case.

In any event, Cappseals claims that the testimony of the undersigned counsel is relevant to the issues surrounding ITV's defenses and claims against Healthy Solutions to be tried in the "second phase" of the trial. Therefore, the parties need clarification from this Court as to what issues are to be tried by this Court, as it will impact whether or not Cappseals will attempt to call the undersigned counsel as a witness in this case, thereby raising the issue of whether another attorney of this firm must now be assigned to act as the lawyer for the plaintiffs during the trial. See Rule 3.7(b) of the Massachusetts Rules of Professional Conduct. It will also impact whether or not ITV and Healthy Solutions have a right to a jury trial on some of the issues in this case.

Accordingly, ITV requests that the trial of this matter should be continued and that a further pre-trial conference be held to resolve some of these outstanding issues. There is no merit to Cappseals' assertion that it will be "forced to sacrifice the time and resources it has expended" preparing for trial, as there should be no duplication of the efforts of its counsel if a short continuance is granted.

ITV DIRECT, INC. and
DIRECT FULFILLMENT, LLC

By their attorney(s),

/s/ Peter S. Brooks

Peter S. Brooks, BBO #058980

Christopher F. Robertson, BBO #642094

Susan W. Gelwick, BBO #567115

Seyfarth Shaw LLP

Two Seaport Lane, Suite 300

Boston, MA 02210-2028

Telephone: (617) 946-4800

Telecopier: (617) 946-4801

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